BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD CHRISTENER	)	
Claimant	)	
	)	
VS.	)	
	)	
STAN KOCH & SONS TRUCKING CO., INC.; AMERICAN LINEHAUL, INC.; AMERICAN P&D, INC.; and AMERICAN FREIGHT, INC.	)	
Respondents	)	Docket Nos. 1,024,222; 1,024,224; 1,030,168; 1,030,169; 1,030,170; 1,030,171; 1,030,172 and 1,030,173
AND	)	
	)	
GREAT WEST CASUALTY CO.; COMMERCE & INDUSTRY INS CO. and CONTINENTAL WESTERN INS. CO.	)	
Insurance Carriers	)	
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent Stan Koch & Sons Trucking, Inc. (Koch) and its insurance carrier, Great West Casualty Company (Great West) requested review of the April 16, 2007, preliminary hearing Order for Medical Treatment entered by Administrative Law (ALJ) Judge Brad E. Avery. Neil A. Dean, of Topeka, Kansas, appeared for claimant. Jeffrey D. Slattery, of Kansas City, Missouri, appeared for respondent Koch and its insurance carrier Great West. Jason J. Montgomery, of Roeland Park, Kansas, appeared for respondent Koch and its insurance carrier Commerce & Industries Insurance Company (Commerce). Matthew S. Crowley, of Topeka, Kansas, appeared for respondent American Freight, Inc., (American Freight) and its insurance carrier, Commerce. Darin M. Conklin, of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund (Fund). Respondents American Linehaul, Inc., (Linehaul) and American P&D, Inc., (P&D) and their insurance carrier, Continental Western Insurance Company (Continental Western) did not appear.

In this procedurally complicated case, two preliminary hearings were held on claimant's claims. All claimant's claims of accident and injury to his upper extremity were heard together, and then all his claims of injury to his back were heard. When the ALJ entered the orders for the preliminary hearings, he entered separate orders for each of the four respondents but combined the upper extremity claim and the back claim for each employer. In Docket Nos. 1,024,222 and 1,024,224, the ALJ found that claimant's date of accident was June 28, 2005, his last date of employment with respondent Koch. He also ordered Koch and Great Western to provide claimant with medical care for injuries to his upper extremities and back.

The ALJ filed separate Orders Denying Medical Treatment in Docket Nos. 1,030,168 and 1,030,169; Docket Nos. 1,030,170 and 1,030,171; and Docket Nos. 1,030,172 and 1,030,173. In each of those three orders, the ALJ denied medical treatment and stated that claimant's alleged accidental injury did not arise out of and in the course of employment.

The record is the same as that considered by the ALJ and consists of the transcript of the preliminary hearing held July 20, 2006, and the transcripts of the two April 10, 2007, Preliminary Hearings and the exhibits attached to each, together with the pleadings contained in the administrative files.

ISSUES

Respondent Koch and its insurance carrier, Great West, first argue that since claimant's last day worked with Koch was June 27, 2005, he was not an employee of Koch on June 28, 2005, the date the ALJ found to be the date of accident. And since there was no employer/employee relationship between Koch and claimant on June 28, 2005, the ALJ had no jurisdiction to award claimant benefits from Koch. Koch and Great West also argue that since claimant worked for respondents Linehaul, P&D, and American Freight after his termination from Koch, and since claimant is claiming injuries from repetitive trauma, claimant's date of injury would be after June 27, 2008, a time when there was no employer/employee relationship between Koch and claimant. Koch and Great West argue, in the alternative, that if the Board finds that claimant's date of injury is on or before the last day claimant worked for Koch, the treatment being sought is not related to any accidental injury arising out of and in the course of his employment with Koch and liability for any additional medical benefits should be the responsibility of Linehaul, P&D, or American Freight.

Respondent American Freight and its insurance carrier Commerce request that they be dismissed from this appeal. The order entered in Docket Nos. 1,030,172 and 1,030,173 was not appealed, and they argue that the Board has no jurisdiction to review a decision,

finding, order or award for which no party to the docketed claim has sought review. American Freight and Commerce also argue that the Board does not have jurisdiction to require them to participate in this appeal and be subjected to potential payment of benefits upon review. American Freight and Commerce also contend that the ALJ correctly found that claimant did not suffer an accidental injury which arose out of and in the course of his employment with respondent. American Freight and Commerce also contend that claimant failed to provide them with timely notice of an alleged accident.

The Fund concurs with the arguments of American Freight and Commerce concerning the jurisdiction of the Board to require its participation in this appeal. The Fund asserts that it was only impleaded in Docket Nos. 1,030,168 and 1,030,170 and that the Orders Denying Medical Treatment in those claims were not appealed. In the event the Board finds it has jurisdiction over the Fund in this appeal, the Fund contends that the evidence indicates that claimant's injuries to his upper extremities and back do not correlate to an accidental injury sustained while in the course of his employment with either Linehaul or P&D. Accordingly, the Fund argues that claimant did not sustain an accidental injury to his upper extremities or back arising out of and in the course of his employment with either Linehaul or P&D. In the event the Board finds that claimant's accident arose out of and in the course of his employment with either Linehaul or P&D, the Fund argues that claimant did not give either employer timely notice of his accident.

Claimant did not file a brief in this appeal.

The issues for the Board's review are:

(1) Did claimant suffer injuries to his upper extremities and to his back that arose out of and in the course of his employment with Koch, Linehaul, P&D, and/or American Freight?

(2) Was there an employer/employee relationship between claimant and Koch on June 28, 2006, the date the ALJ found to be the date of accident in Docket Nos. 1,024,222 and 1,024,224?

(3) Does the Board have jurisdiction to require Linehaul, P&D, American Freight, and the Fund to participate in this appeal, since the Orders Denying Medical Treatment in Docket Nos. 1,030,168; 1,030,169; 1,030,170; 1,030,171; 1,030,172 and 1,030,173 were not appealed?

(4) Did claimant give Linehaul, P&D and American Freight timely notice of his accident?

FINDINGS OF FACT

Claimant began working for Koch on July 14, 2003, as a driver/deliverer. His delivery area was a 400-500 mile radius of the distribution center. Claimant was not responsible for loading the trailer, but he was responsible for unloading the freight. He would normally unload a vehicle more than once a day. Toward the end of his employment with Koch, he moved up in seniority and would unload generally two trailers a day. Loads varied from 15,000 pounds up to 44,000 pounds. A small percentage of a load would be on pallets, and he would not handle those items individually. He personally handled contents of the load that were not on pallets. Claimant's last day working for Koch was June 28, 2005.

While working for Koch, claimant developed problems with his bilateral upper extremities and his low back. On July 21, 2005, he filed an Application for Hearing claiming accidents on a "series of dates beginning on December 2003 ending the last day worked on June 27, 2005," and claiming injuries to "both upper extremities" while "lifting boxes, driving a truck."[1] This was docketed as No. 1,024,222.

Also on July 21, 2005, claimant filed an Application for Hearing claiming accidents on a "series of dates beginning on December 2003 ending the last day worked on June 27, 2005" while "lifting boxes."[2] Claimant claimed injuries to his back. This was docketed as No. 1,024,224.

On August 29, 2005, claimant went to work for Linehaul. Three to four weeks later, in September 2005, Linehaul's name changed to P&D. When claimant went to work for Linehaul and P&D, he worked as a long haul driver. The driving aspect of his job was similar to his job with Koch, but he drove on longer, more extended trips. Claimant's employment with P&D ended January 29, 2006, when the company was bought out.

Linehaul and P&D had insurance coverage with Continental Western. The owner of Linehaul and P&D testified that the businesses' workers compensation insurance coverage was cancelled for nonpayment of premium, but he was not sure of the cancellation date. According to information filed with the Division, Linehaul and P&D's insurance coverage cancellation was effective on September 27, 2005.

Linehaul and/or P&D was bought out on January 29, 2006. Claimant became an employee of American Freight on January 30, 2006. He was not required to fill out a new

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[1] Form K-WC E-1, Application for Hearing filed July 21, 2005, (Docket No. 1,024,222).

[2] Form K-WC E-1, Application for Hearing filed July 21, 2005, (Docket No. 1,024,224).

application for employment. He was still employed as a long haul driver performing the same duties he performed for Linehaul and P&D.

While working for Linehaul and P&D, claimant worked about 50-70 hours per week. Compared to the work with Koch, the work at Linehaul, P&D and American Freight was lighter. At Koch, he had to physically lift the freight while unloading the trailers. At Linehaul, P&D and American Freight, claimant only drove. Only on three occasions while working for Linehaul, P&D and American Freight did claimant have to lift any freight.

Mike Gabrick was the owner of Linehaul and P&D. Mr. Gabrick stated that claimant was never an employee of Linehaul but was hired at a time of transition. Claimant's truck was under Linehaul's authority and claimant's pay stubs may have still indicated Linehaul, but the money was in P&D's payroll account and claimant's actual paycheck came from P&D. The name change from Linehaul to P&D was completed by the end of August, about the same time claimant was hired. Claimant testified that he was told to put Linehaul on his log sheets, the name on the truck said Linehaul, and the name of the company on his paycheck was Linehaul. After about three or four weeks, sometime in September 2005, the name was changed to P&D.

A preliminary hearing was held on July 20, 2006, in Docket Nos. 1,024,222 and 1,024,224. After direct examination, before any cross, Judge Avery stated: "In consulting with counsel, it appears that there should be another employer present . . . that may have assumed the liability of the case if it's found compensable, so we will continue the hearing until they are joined and the hearing is rescheduled."[3]

Claimant then filed six Applications for Hearing on July 27, 2006. Applications in Docket Nos. 1,030,168; 1,030,170 and 1,030,172 were filed against Linehaul, P&D and American Freight respectively, and each claimed a series of accidents from the first date of employment and continuing. On each application, claimant indicated that the claim was an aggravation of a previous work injury. Claimant stated the cause of the accidents was driving and any and all repetitive activities performed by claimant, and he claimed injuries to his upper extremities.[4] Applications in Docket Nos. 1,030,169; 1,030,171 and 1,030,173 were also filed against Linehaul, P&D and American Freight respectively, and each claimed a series of accidents from the first date of employment and continuing. Each also noted that the claim was an aggravation of a previous work injury. Claimant stated the causes

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[3] P.H. Trans. (July 20, 2006) at 28.

[4] K-WC E-1, Application for Hearing filed July 27, 2006 (Docket Nos. 1,030,168; 1,030,170; 1,030,172).

of the accidents were all activities performed for the employer by claimant. In these three claims, claimant stated he suffered injuries to his back.[5]

On April 10, 2007, two preliminary hearings were held on claimant's claims. All the upper extremity claims were heard together, and then all the back claims were heard.

Upper Extremities Claim

Claimant's problems with his hands and wrists progressed and, in September 2004, he reported the problem to his supervisor at Koch, Juan Matoes, and asked to see a doctor. Claimant had already been seeing a doctor for his back problem, and Mr. Matoes told him it would be okay to see the doctor for his hand and wrist pain. Claimant was seen by Dr. Keith Sargent, who diagnosed him with tendinitis in the wrists and elbows. Dr. Sargent recommended tennis elbow bands on the arms at work and wrist splints for use at night while claimant slept. Dr. Sargent also suggested nerve conduction studies to rule out carpal tunnel syndrome. Claimant told Mr. Matoes about Dr. Sargent's suggestion of nerve conduction studies, but Mr. Matoes did not make any comment concerning this suggestion. Claimant continued to see Dr. Sargent for periodic visits. His last visit was in December 2004. He continued to have complaints about his hands and wrists and continued to voice complaints to his supervisor, and it was decided that he wait until after the first of the year for any treatment or tests. However, by the first of the year Koch had lost a couple of employees because of injuries, and claimant went to the top of the seniority list. As a result, he was working two loads a day almost every day, and the work did not slow down that spring.

When claimant finally asked to go back to the doctor, he was told that he had never filled out an accident report. Claimant then filled out an accident report, but his claim was denied because he failed to put a date of accident on the report. Claimant filled out another accident report stating that the condition was ongoing and worsening. Mr. Matoes then referred claimant to Bill Sullivan from the corporate safety department. Koch kept putting claimant off, and then on June 28, 2005, claimant was terminated from Koch for a violation of company policy. At no time was claimant taken off work or given restrictions due to his wrist and hand complaints while he was working for Koch.

During the approximate two-month period after his termination from Koch and before his employment with Linehaul on August 29, 2005, claimant's symptoms eased. When claimant was first employed by Linehaul, he had a conversation with Mr. Gabrick.

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[5] K-WC E-1, Application for Hearing filed July 27, 2006 (Docket Nos. 1,030,169; 1,030,171; 1,030,173).

An agreement was made that claimant would not have to haul loads where he had to physically lift anything.

While working for Linehaul, claimant did not notice any change in his symptoms, either in frequency or intensity, to his hands or wrists. While he was working for P&D, his problems started getting a little worse. He noticed that when he was driving, the numbness and tingling would occur more frequently. The pain was worse at night. He did not talk to anyone at work concerning this change in his condition. After claimant began to work for American Freight, he continued to notice the problems with his hands and wrists worsen in frequency and intensity. In April 2006, American Freight acquired a dedicated contract, and claimant was pulling double trailers, which required him to move more dollies and do more hooking and unhooking of trailers. He would move dollies from one to one and a half hours per day. This type of work brought the soreness back to his upper extremities. He, however, did not inform anyone at American Freight that the dolly work was causing problems with his upper extremities.

Claimant was examined by Dr. Lynn Ketchum on December 1, 2005, at the request of claimant's attorney. This examination was conducted while claimant was working for P&D, and was during the period after he filed a workers compensation claim against Koch. Dr. Ketchum only evaluated claimant's upper extremities. Dr. Ketchum had nerve conduction tests performed on both claimant's wrists. He diagnosed claimant with bilateral carpal tunnel syndrome. He recommended bilateral carpal tunnel release surgeries. He also recommended that claimant do no repetitive gripping more than 30 percent of the time. Dr. Ketchum related claimant's conditions to the work of driving and heavy lifting that he has been doing over the years.

Claimant was seen by Dr. Terrance Pratt on April 18, 2006, at the request of Koch and Great West. Claimant's complained of bilateral hand discomfort and elbow discomfort. Claimant reported the right exceeded the left with numbness and tingling. He has a sharp discomfort when he grasps. He has aching involving the base of his thumbs and diminished grip strength. His elbow symptoms only occur if he is throwing freight or performing repetitive physical activities, with aching inside the joint, right worse than left. Dr. Pratt diagnosed claimant with bilateral distal upper extremity discomfort and numbness with reported peripheral nerve entrapment and findings suggestive of mild right lateral epicondylitis with reported history of bilateral elbow discomfort.

Claimant told Dr. Pratt that he believed this developed in relationship to driving as well as freight handling activities. Claimant was experiencing symptoms currently while driving, and noted he had increased his hours with his current employer. Dr. Pratt stated:

"It is probable that those activities are aggravating his underlying involvement."[6] He further stated that "it is probable that his current symptoms were actually aggravated in relationship to work for Stan Koch Trucking in relationship to the distal upper extremity involvement."[7]

In an addendum to his report dated June 2, 2006, Dr. Pratt stated:

> [Claimant] reports aggravation in relationship to driving. His activities for American Freight have aggravated his right elbow involvement. He reported a specific event recently in which he was throwing freight and had an increase in symptoms. His activities at American Freight have aggravated his underlying bilateral upper extremity peripheral nerve entrapment. He reports an increase in work hours and reports aggravation of symptoms in relationship to driving. . . . Based on his history, he had symptoms suggestive of peripheral nerve entrapment over a prolonged duration, and per his report even prior to initiating tasks for Stan Koch and Sons, so it would relate to his long term involvement as well as his more recent aggravation.[8]

Dr. Fariz Habib saw claimant on April 3, 2007. Claimant's chief complaints were numbness and tingling of the hands. He also gave a history of low back pain. Dr. Habib performed nerve conduction studies of the right and left median nerves and the right and left ulnar nerve. An EMG was also performed. Dr. Habib diagnosed claimant with bilateral carpal tunnel syndrome. He recommended conservative management with splinting of the wrists in neutral positions and non-steroidal anti-inflammatory drugs and analgesics. In case of intractable pain or progressive neurological deficits, surgical releases of both the carpal tunnels was recommended.

At the request of respondent American Freight, Dr. Chris Fevurly reviewed the reports of Dr. Ketchum and Dr. Habib. He reported that there was no objective evidence of aggravation or worsening in the median nerve entrapment from claimant's work activities at American Freight. He noted that claimant's distal motor latencies improved over the 16 month span between the two tests. He stated that "[p]erhaps one could conclude that the work activity at American Freight was therapeutic in some manner."[9]

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[6] P.H. Trans. (Apr. 10, 2007), Docket No. 1,024,222 et al, Resp. Ex. C at 22.

[7] *Id.*, Resp. Ex. C at 23.

[8] *Id.*, Resp. Ex. C at 24.

[9] P.H. Trans. (Apr. 10, 2007), Docket No. 1,024,222 et al., Resp. Ex. B at 2.

Back Claim

Claimant began experiencing low back discomfort in the fall of 2003. There was no specific accident. While working at Koch, he would throw freight, which would cause him to have low back pain. The medical records indicate claimant suffered an onset of symptoms in his low back on December 30, 2003. Claimant saw a doctor on January 2, 2004, and told the doctor that he had been unloading a truck and when he went home, he laid down on the floor and did some stretching, at which time he started to have spasms in his back. He also reported to the doctor that his back locked up on him after doing the exercises, and he could not get up off the floor. When he reported this to his employer, he was sent to Lawrence Occupational Health Services. On January 2, 2004, he was released to return to light duty work.

On February 26, 2004, claimant reported to Koch that he had been unloading a trailer and strained his back. He had to stop working that day. A coworker was called in to finish his runs for that day. Koch again sent him to Lawrence Occupational Health Services, where he was seen by Dr. Michael Geist. Dr. Geist gave him a lifting restriction of no more than 20 pounds. Koch put him back to work for long haul runs. Later, claimant went back doing shorter runs but was limited and did not have to do any unloading. Claimant believed he was on light duty for a period of three or four weeks. On March 19, 2004, claimant was seen by Dr. Dennis Sale from the Lawrence Occupational Health Services. Dr. Sale released him to return to regular work.

Claimant returned to Lawrence Occupational Health Services for medical treatment on September 23, 2004, because the loads at Koch were becoming heavier, his pain was becoming unbearable, and he did not want it to get to the point where his back would lock up. He was seen by Dr. Keith Sargent. The pain was still above his belt line in the middle of his back. If claimant was driving, it was uncomfortable. The longer he drove, the more uncomfortable he would feel. The pain bothered him most when he was lifting freight.

In October 2005, while working for P&D, claimant was pulling pallets and noticed his back tightened up on him. His pain was in the same area of his back as before. The pain, however, was not as severe as when he threw freight at Koch. He told Mr. Gabrick that the incident bothered his back a little. Claimant did not miss any work for the October 2005 incident, nor did he submit anything in writing to P&D requesting workers compensation benefits.

Claimant saw Dr. Daniel Zimmerman on October 18, 2005, at the request of his attorney concerning his back. Dr. Zimmerman diagnosed claimant with osteoarthritis. He

stated: "It is my opinion that the osteoarthritis affecting the lumbosacral spine is causally related to the work duties performed in his employment at Koch Trucking."[10]

During the last part of claimant's employment with American Freight, he was pulling double trailers which required him to do extra physical activities. He would have discomfort while he was performing those extra activities, but the discomfort would last only from 15-30 seconds.

Today, claimant has a slight stiffness in his back. He does not push a lawn mower any longer. His pain is better than when he worked for Koch because he does not have the physical aspect of unloading freight. His back discomfort is about the same as when he worked at Koch.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-501(a) states:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-510h(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

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[10] P.H. Trans. (Apr. 10, 2007), Docket No. 1,024,224, Cl. Ex. 4 at 15.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[12], the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

In *Logsdon*,[13] the Kansas Court of Appeals stated:

> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Treaster*,[14] the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which these claims allege) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. In *Treaster*, the Kansas Supreme

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[11] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[12] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[13] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 3, 128 P.3d 430 (2006).

[14] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

Court also approved the principles set forth in *Berry*,[15] in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury. The long line of cases applying the rule for the last date possible as the date of accident was altered by the Legislature's July 1, 2005, amendment to K.S.A. 44-508(d), which now states that a claimant's date of accident is the earliest of several triggering events:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[16]

K.S.A. 44-534a(a)(2) states in part:

> A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2006 Supp. 44-551 states in part:

> (i)(1) . . . All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative

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[15] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[16] K.S.A. 2006 Supp. 44-508(d)

> law judge shall be subject to review by the board upon written request of any interested party within 10 days. . . .
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> (2)(A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2006 Supp. 44-555c(a) states in part: "The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act."

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[17] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[18]

ANALYSIS

The ALJ's April 16, 2007, Order for Medical Treatment resulted from two preliminary hearings held on April 10, 2007. Those preliminary hearings were conducted pursuant to Applications for Preliminary Hearing[19] which were filed by claimant in Docket Nos. 1,024,222; 1,024,224; 1,030,168; 1,030,169; 1,030,170; 1,030,171; 1,030,172 and 1,030,173. Notice of hearing was provided to respondent Koch and its insurance carriers, Great West and Commerce; respondent Linehaul and its insurance carrier, Continental; respondent P&D and its insurance carrier, Continental; respondent American Freight and its insurance carrier, Commerce; and the Fund. For purposes of hearing, the ALJ consolidated Docket Nos. 1,024,222; 1,024,224; 1,030,168; 1,030,169; 1,030,170; 1,030,171; 1,030,172 and

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[17] K.S.A. 44-534a.

[18] K.S.A. 2006 Supp. 44-555c(k).

[19] Form K-WC E-3 Application for Preliminary Hearing (filed May 31, 2006), Docket No. 1,024,222; Form K-WC E-3 Application for Preliminary Hearing (filed May 31, 2006), Docket No. 1,024,224; Form K-WC E-3 Application for Preliminary Hearing (filed Nov. 13, 2006), Docket No. 1,030,168; Form K-WC E-3 Application for Preliminary Hearing (filed Feb. 23, 2007), Docket No. 1,030,169; Form K-WC E-3 Application for Preliminary Hearing (filed Nov. 13, 2006), Docket No. 1,030,170; Form K-WC E-3 Application for Preliminary Hearing (filed Feb. 23, 2007), Docket No. 1,030,171; Form K-WC E-3 Application for Preliminary Hearing (filed Nov. 13, 2006), Docket No. 1,030,172; Form K-WC E-3 Application for Preliminary Hearing (filed Feb. 23, 2007), Docket No. 1,030,173.

1,030,173. Following those hearings, the ALJ issued several orders. Although only one of those orders was appealed to the Board, the Board has jurisdiction of all those docketed claims consolidated for the hearings. The Board has personal jurisdiction over each respondent and each insurance carrier present, represented or given notice of those hearings and subject matter jurisdiction as to each docketed claim noticed and consolidated for those two preliminary hearings.

It is not disputed that claimant suffered injuries to his upper extremities and back during his employment at Koch. The Board need not decide a single date of accident for these injuries at this juncture of the proceedings. Date of accident is not a jurisdictional issue on an appeal from a preliminary hearing order. A determination of a claimant's date of accident may be required in order to resolve a jurisdictional issue such as whether claimant gave timely notice or written claim. In this case, a determination of claimant's date of accident is not required to decide the issues raised by respondent Koch.

Koch raises an issue about date of accident in two respects, the first being whether claimant's last day of work for Koch was June 27, 2006, or June 28, 2006. There is testimony for each date, but it is of little consequence which date is used. The real issue is whether claimant's current need for medical treatment is the direct result of the injuries claimant suffered during his employment with Koch or, instead, is due to intervening accidents, injuries and aggravations claimant may have suffered while working for his subsequent employers. Koch bears the burden to prove intervening injury.

The ALJ found that "[t]hough claimant suffered subsequent aggravations of his condition, the court finds such were temporary exacerbations and that Koch is responsible for providing medical treatment to cure and relieve the effects of his injuries."[20] This Board Member agrees with the findings and conclusions of the ALJ. While the subsequent employers may have some liability to provide treatment for the temporary aggravations that occurred during their respective periods of employment, the treatment claimant is currently seeking is not for any such temporary exacerbation of his symptoms. Rather, claimant is in need of treatment for the natural consequence of conditions that arose out of his employment with Koch. Which employer should be liable for the payment of past medical expenses was not a part of the ALJ's Order.

CONCLUSION

Based on the record presented as of April 10, 2007, this Board Member finds that claimant suffered injuries to his back and his bilateral upper extremities by a series of

[20] ALJ Order for Medical Treatment (Apr. 16, 2007) at 1.

accidents each and every working day through June 28, 2005, his last day of work for respondent Koch. These accidents arose out of and in the course of his employment with respondent Koch. Therefore, Koch, together with its insurance carrier, Great West, are responsible for the cost of providing reasonable medical care and treatment to cure and relieve claimant from the effects of those injuries to his bilateral upper extremities and back. With this finding, the remaining issues are rendered moot.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated April 16, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2007.

_____
BOARD MEMBER

c: Neal A. Dean, Attorney for Claimant
Jeffrey D. Slattery, Attorney for Respondent Koch and its Insurance Carrier Great West
Jason J. Montgomery, Attorney for Respondent Koch and its Insurance Carrier Commerce
Matthew S. Crowley, Attorney for Respondent American Freight and its Insurance Carrier Commerce
Darin M. Conklin, Attorney for Workers Compensation Fund
American Linehaul, Inc., P.O. Box 4283, Topeka, KS 66604-0283
American P&D, Inc., P.O. Box 4283, Topeka, KS, 66604-0283
Continental Western Insurance Co., P.O. Box 80439, Lincoln, NE, 68501
Brad E. Avery, Administrative Law Judge